objected that under our system of government political opinion is obviously no test of fitness, as herein defined, and that consequently the imposition of such qualifications is without the power of the legislature.

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THE EFFECT ON A PROMISSORY NOTE OF A STIPULATION FOR ATTORNEY'S FEES IN THE MORTGAGE SECURITY.—Various effects have been ascribed to a stipulation in a promissory note that the maker will pay attorney's fees if the collection of the note at maturity necessitates legal proceedings. Such an agreement has been deemed usurious, principally in jurisdiction where statutes prescribe specifically the cases in which costs are recoverable.[1] This theory, however, disregards the intention of the parties, essential to usury,[2] and presumes that means adapted to the oppression of the borrower have in fact been oppressively employed.[3] Moreover, the debtor can escape the additional burden by meeting his just obligation at its maturity, and no contract is usurious if at maturity principal and lawful interest will discharge the contract according to its terms.[4] It has been argued further that the creditor gets nothing since his expenditures rendered necessary by the debtor's default usually outrun the benefit procured by the stipulation.[5]

A second theory recognizes this device as a means for oppressing the borrower, and, separating the stipulation for attorney's fees from the note, holds it void as a penalty.[6] This apparently carries the principal of solicitation for the debtor too far for there is nothing oppressive in a provision for indemnity against a possible loss due to the debtor's default,[7] and to insure this character to such a provision all courts require the amount to be reasonable.[8] Moreover, the right to make such a contract is as clear as that to make any contract not prohibited by law or opposed to sound policy.[3]

The third view involves the effect of such a provision on the negotiability of the note. It is argued that brevity and freedom from collateral stipulations are essential to negotiability,[8] that the sum payable must be certain not only before, but also after maturity, and that the stipulation for attorney's fees violates these conditions.[9] This, however, seems erroneous. Certainty is required only because such instruments are substitutes for money, but as they lose this character at maturity certainty thereafter is not essential. Therefore, since the provision in question only becomes operative after

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[1]State of Ohio *v.* Taylor (1841) 10 Ohio 378; Dow *v.* Updike (1881) 11 Neb. 95.

[2]Tyler, Usury 103.

[3]Wilson Sewing Machine Co. *v.* Moreno (1879) 6 Sawy. 35.

[4]Gaar *v.* Louisville Banking Co. (Ky. 1874) 11 Bush 180; Peyser *v.* Cole (1883) 11 Ore. 39.

[5]Peyser *v.* Cole *supra.*

[6]Witherspoon *v.* Musselman (Ky. 1878) 14 Bush 214; Bullock *v.* Taylor *et al.* (1878) 39 Mich. 137.

[7]Peyser *v.* Cole *supra.*

[8]Woods *v.* North *et al.* (1877) 84 Pa. St. 407.

[9]Sylvester Bleckley Co. *v.* Alewine (1896) 48 S. C. 308; Jones *v.* Radatz (1880) 27 Minn. 240.

maturity the essential certainty of the note is not thereby destroyed.[10] Moreover, during currency it serves as a sort of guarantee and facilitates rather than impedes negotiability.[11] Logically the amount of the note and the attorney's fees cannot be recovered in a single action since no cause of action exists for the latter until a suit on the note has been instituted.[12] This, however, seems unnecessarily strict, and many courts disregard it.[13]

Courts are frequently required, as in a recent case, *Bank* v. *McCall* (Okl. 1910) 106 Pac. 866, to determine the force of a provision for attorney's fees in the event of foreclosure, inserted in a mortgage securing the note. It is elementary that contemporaneously executed agreements relating to the same subject matter must be construed together as a single contract.[14] A note may be affected in this manner, but a *bona fide* purchaser for value of the note alone takes free from such collateral limitations. This rule of construction is not of necessary application, however, if the limiting instrument is a mortgage, since the nature and purpose of the two instruments differ materially; nor are they governed by the same branch of the law. Of course, conditions in a mortgage may be incorporated into a note by reference, although reference to a part will not serve to incorporate the whole.[15] Where, however, covenants are inserted merely to preserve the security, the note is unaffected thereby since the instruments though part of the same transaction are separate contracts relating to distinct subject matters.[16] Nor ought personal convenants to have any effect; their enforcement does not require resort to the note,[17] and a recognition of their influence subverts the high character of a note by subordinating it to the security.[18] Provisions for attorney's fees in the event of foreclosure are apparently personal covenants, unless made a lien upon the property, and the denial of their effect upon the negotiability of the note secured, where recognition would render the note non-negotiable, as in the jurisdiction of the principal case, is commendable.

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THE DUTY OF CARRIERS OF PASSENGERS TO ACCEPT ALL APPLICANTS FOR TRANSPORTATION.—*Prima facie* every applicant is entitled to become a passenger,[1] but this right, of necessity, is subject to certain limitations. These limitations group themselves around two principles: the duty of the carrier to other passengers, and the right of the carrier to protect its own interests.

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[10]Stapleton *v.* Louisville Banking Co. (1895) 95 Ga. 802.

[11]Oppenheimer *v.* Bank (1896) 97 Tenn. 19.

[12]Easter *et al.* *v.* Boyd (1875) 79 Ill. 325.

[13]Wilson Sewing Machine Co. *v.* Moreno *supra.*

[14]Munro *v.* King (1877) 3 Colo. 238; Elmore *v.* Hoffman *et al.* (1858) 6 Wis. 67.

[15]Donaldson *v.* Grant (1896) 15 Utah 231; Chapman *v.* Steiner (1897) 5 Kan. App. 326.

[16]Frost *v.* Fisher (1899) 13 Colo. App. 322; Thorp *v.* Mindeman (1904) 123 Wis. 149.

[17]Klokke *v.* Escailler (1899) 124 Cal. 297.

[18]Owings *v.* McKenzie (1895) 133 Mo. 323. *Contra,* Garnett *v.* Meyers (1902) 65 Neb. 287.

[1]N. & W. R. R. Co. *v.* Galliher (1893) 89 Va. 639.